No. 96-370

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When does the statute of limitations begin to run on an action under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 et seq., to collect overdue employer withdrawal liability payments?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 73 F.3d 971 and is reprinted at pages 1a-5a of the Appendix to the Petition for a Writ of Certiorari (Pet. App.). The opinion of the United States District Court for the Northern District of California is unreported, and is reprinted at Pet. App. 6a-19a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing on May 13, 1996. In an order entered on August 1, 1996, Justice O'Connor extended the time for filing a petition for a writ

of certiorari to September 10, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set out as an Appendix to this brief.

STATEMENT OF THE CASE

1. *Statutory Scheme*

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, 29 U.S.C. §§ 1381-1461, provides that an employer who withdraws from a multiemployer pension plan must make withdrawal liability payments sufficient to cover that employer's fair share of the plan's unfunded vested liabilities.[1] 29 U.S.C. §§ 1381, 1391. The Act's withdrawal liability payment requirement protects the financial integrity of multiemployer plans, prevents withdrawing employers from shifting their burdens to remaining employers, and eliminates an incentive for employers to flee underfunded pension plans. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 115 S.Ct. 981, 985 (1995) ("*Schlitz*"); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 216 (1986); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722-23 (1984).

As a general matter, an employer completely withdraws from a plan when it "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." § 1383(a). There are particularized definitions of "complete withdrawal" for the building and construction industry (§ 1383(b)), entertainment industry (§ 1383(c)), and trucking and warehousing industry (§ 1383(d)).[2]

[1] Pension funds develop unfunded vested liability when the actuarial value of pension benefits nonforfeitable under ERISA § 1301(a)(8)) exceeds the plan's assets. (All statutory references in the form "§ ——" are to 29 U.S.C. § ——.)

For complete withdrawals, the statute defines the "*date* of a complete withdrawal" as "the date of the cessation of the obligation to contribute or the cessation of covered operations." § 1383(e) (emphasis supplied). The amount of withdrawal liability and the periodic payment schedule for paying that liability are determined as of statutorily-specified dates calculated from the "date of complete withdrawal." *Schlitz*, 115 S.Ct. at 986, 992, citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A).[3] The statute sets out a series of steps to be followed in collecting the withdrawal liability, as follows:

a. MPPAA places responsibility for assessing and collecting withdrawal liability on the plan sponsor, almost always a joint labor-management board of trustees. § 1382, § 1002(16)(B). "As soon as practicable" after an employer's withdrawal from the plan, the plan sponsor must determine the employer's withdrawal liability, if any, prepare a statutorily-mandated schedule for payment of that liability in installments, notify the employer of the amount of the liability and the payment schedule, and "demand payment in accordance with the schedule." §§ 1382, 1399(b).

The complex calculations necessary for a plan's actuary to determine an employer's withdrawal liability are described in *Concrete Pipe & Prods. v. Construction La-*

[2] MPPAA also provides for withdrawal liability in the event of a partial withdrawal. 29 U.S.C. § 1381(a). A "partial withdrawal" ordinarily occurs if "for [a] plan year: (1) there is a 70-percent contribution decline or (2) there is a partial cessation of the employer's contribution obligation." § 1385(a). A particularized definition of "partial withdrawal" applies to the retail food industry. § 1385(c).

[3] In many instances, the statutory "date of complete withdrawal" must be determined based on events occurring long after that date has passed. *See* pp. 17-19, *infra*.

borer's Pension Trust, 508 U.S. 602, 609-10 (1993). *See* §§ 1388-1391, 1393. Once the actuary has calculated the withdrawal liability, the plan sponsor must prepare a schedule for the payments by determining the "level annual payments" necessary to amortize that liability, using a statutory formula pursuant to which the amount of each annual payment roughly approximates the withdrawing employer's typical contribution to the plan in earlier years. *See Schlitz*, 115 S.Ct. at 986; § 1399(c)(1).[4] Finally, these "level annual payments" are made "payable in four equal installments due quarterly," unless the plan rules specify other installment intervals. § 1399(c)(3).

b. Having completed the calculations, the plan sponsor then provides the withdrawing employer with notice of its withdrawal liability and installment payment schedule, and the employer may, within 90 days, ask the plan sponsor to review the determination of liability or the payment schedule. § 1399(b)(2)(A)(i). After this review, "[a]ny dispute between an employer and the plan sponsor . . . shall be resolved through arbitration," which either party may initiate within specified time periods. § 1401(a). Review of the arbitrator's decision is available through an action in the district court to enforce, vacate, or modify the award. § 1401(b)(2).

After receiving the plan sponsor's assessment notice, however, the employer must begin to make withdrawal liability payments "in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule." § 1399(c)(2). *See also* § 1401(b) & (d) and § 1399(c)(3).[5]

[4] If the annual payments would stretch past 20 years, the remaining payments ordinarily are forgiven. 29 U.S.C. § 1399(c)(1)(B).

[5] The employer has the option "to prepay the outstanding amount of the unpaid withdrawal liability payments . . ., plus accrued interest, if any, in whole or in part, without penalty." 29 U.S.C. § 1399(c)(4).

c. An acceleration provision in the statute provides that, in the event of a "default" by the employer, the "plan sponsor may require immediate payment of the outstanding amount of the employer's withdrawal liability." § 1399(c)(5); *see also* 29 C.F.R. § 4219.31(b)(2). The statute defines "default" for purposes of this acceleration provision as "the failure of an employer to make, when due, any payment under this section if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. § 1399(c)(5)(A). A "default" can also "be any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." § 1399(c)(5)(B).

A PBGC regulation prohibits a declaration of "default" based on missed payments during the review and arbitration process. The regulation provides that no default can occur until at least 60 days after the later of (i) expiration of the period for requesting review by the plan; (ii) expiration of the period for initiating arbitration; or (iii) issuance of the arbitrator's decision, if arbitration is timely initiated. 29 C.F.R. § 4219.31(c)(1). The regulation echoes the statute, however, in providing that during this period of review, "amounts due . . . shall be paid in accordance with the schedule established by the plan sponsor. If the payment is not made when due under the schedule, the payment is overdue . . . ." 29 C.F.R. § 4219.31(c)(2).

d. If the employer does not make a scheduled withdrawal liability payment, the plan sponsor may bring suit under MPPAA's civil suit provision, 29 U.S.C. § 1451:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to

> a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both. [§ 1451(a)(1)]

This civil suit provision gives state and federal courts concurrent jurisdiction over "an action brought by a plan fiduciary to collect withdrawal liability," § 1451(c), and provides that:

> In an action . . . to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title.) [§ 1451(b)][6]

The statute of limitations for actions under § 1451, including actions to collect withdrawal liability, is contained in § 1451(f):

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

2. ***Facts***

Ferbar Corporation ("Ferbar") contributed to the Bay Area Laundry and Dry Cleaning Pension Fund ("Fund") for several years for the employees of three laundries. Joint Appendix (J.A.) 19. On or about March 1, 1985, Ferbar ceased all contributions. J.A. 20.

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[6] Section 1145 provides that employers contractually obligated to make contributions to a multiemployer plan have a statutory obligation to do so.

On December 12, 1986, the Trustees of the Fund assessed withdrawal liability against Superior French Laundry, one of three laundries operated by Ferbar, in the amount of $45,570.80. J.A. 23. The assessment notice informed Ferbar that it could, if it wished, make a single lump-sum payment of the total withdrawal liability within 60 days after receipt of the notice, but otherwise must make monthly installment payments of $345.50 commencing February 1, 1987. J.A. 23. The schedule of monthly payments would continue for 240 months, concluding with a final payment of $344.96. The notice also stated that Ferbar was required by law to make the payments as scheduled notwithstanding any request for review or appeal. J.A. 23.

By letter dated February 27, 1987, Ferbar exercised its right to request review of the assessment. J.A. 31. During the pendency of the review, Ferbar made no withdrawal liability payments. J.A. 20, 46.

Having received no withdrawal liability payments, the Trustees, on April 14, 1987, notified Ferbar of the delinquency. J.A. 35. The delinquency notice stated that Ferbar had sixty days to cure the delinquency, or it would be in "default," in which case the full amount of the outstand- withdrawal liability payments could be accelerated. J.A. 35. The notice of delinquency also notified Ferbar once again that ERISA required it to make the scheduled payments notwithstanding any request Ferbar might make for review or appeal of the Fund's determination. J.A. 35.

Ferbar did not cure its delinquency after receiving the delinquency notice, but did, on July 8, 1987, file with the Trustees a notice of initiation of arbitration of its disputed withdrawal liability. J.A. 20, 37, 47.

3. ***Proceedings***

a. On February 9, 1993, the Fund's Trustees filed in district court a "Complaint for Collection of Employer Withdrawal Liability Payments" against Ferbar. J.A. 6.

February 9, 1993 was eight days more than six years after the first withdrawal liability payment was due according to the payment schedule contained in the Fund's assessment notice, but *less* than six years before the second payment and the remaining payments were due. The Complaint sought (i) the total amount of the unpaid withdrawal liability, or, in the alternative, (ii) the total of the overdue payments and an injunction requiring Ferbar to make the remaining payments. J.A. 11-12.

After answering the Complaint, Ferbar filed a Motion for Summary Judgment based solely on the applicable statute of limitations. J.A. 1, 13. The Trustees filed a cross-motion for summary judgment on the same issue. J.A. 1. The relevant dates, set out above, were not disputed. J.A. 19, 45.

b. The District Court held that the Trustees' cause of action arose, and the limitations period on the entire amount of the withdrawal liability began to run, on February 1, 1987, when Ferbar failed to make the first installment payment on the date scheduled. Pet. App. 12a. On that basis, the District Court held the Trustees' action was entirely time-barred under the three-year "discovery" statute of limitations set forth in § 1451(f)(2), notwithstanding the express language in the statute providing that the applicable limitations period is "the later of" the three-year discovery period in § 1451(f)(2) or the six-year period in § 1451(f)(1). Pet. App. 9a-11a. Alternatively, the District Court held that the Trustees' action was also entirely time-barred under the six-year limitations period in § 1451(f)(1), since the lawsuit was filed a few days more than six years after the first payment was due according to the Trustees' demand letter. Pet. App. 11a-18a.

c. On appeal from dismissal of the action, the Ninth Circuit held that the District Court had erred by applying the three-year discovery limitations period in § 1451(f)(2), recognizing that § 1451(f) "clearly directs courts to apply 'the later of' the two periods of

limitations' " and that, "[o]n the facts of this case" the six-year accrual period in § 1451(f)(1) was the later one. Pet. App. 3a.

The Ninth Circuit nonetheless affirmed the judgment dismissing the case in its entirey, holding that the action was time-barred under the six-year limitations period of § 1451(f)(1). Pet. App. 5a. Unlike the District Court, the Ninth Circuit ruled that the § 1451(f)(1) limitations period begins to run not when payments are due but on the statutory "date of complete withdrawal." Pet. App. 4a-5a.

In so holding, the Ninth Circuit stated that it was bound by its own decision in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994). In *Thibodo* the Ninth Circuit held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-17. Ferbar had ceased making contributions to the Fund on March 1, 1985, so that was the date of withdrawal. *See* § 1383(e). Because the Trustees' action was filed on February 9, 1993, more than six years later, the Ninth Circuit affirmed the summary judgment for Ferbar. Pet. App. 5a.

Judge Trott concurred reluctantly in the Ninth Circuit's decision, stating that he was compelled to join in the judgment by the court's previous decision in *Thibodo*. In his concurrence, Judge Trott, noting that the D.C. Circuit had, in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989), decided the same statute of limitations issue differently than the Ninth Circuit, expressed the view that *Joyce* "does a better job of answering the questions raised by these issues. . . ." Pet. App. 5a. In *Joyce*, the District of Columbia Circuit held that the limitations period for an action to collect withdrawal liability begins to run not

on the date of withdrawal, but upon the date of the employer's failure to make payments in accordance with the payment schedule.

SUMMARY OF ARGUMENT

I. As a general matter, a statute of limitations runs from the date that a cause of action could have first been filed, and a cause of action can first be filed, or "accrues," when the defendant breaches some legal obligation. MPPAA follows these usual rules, providing that the statute of limitations runs from when the "cause of action arose," and that a cause of action arises whenever there is an "act or omission . . . under the statute" that injures the plaintiff. §§ 1451(a) and (f).

Considering seriatim the various junctures in the statutory scheme which might be thought to signal an employer obligation with respect to withdrawal liability, it becomes clear that an employer's statutory duty with respect to such liability is to make periodic payments when due after demand by the plan's trustees, nothing more. Consequently, as is true generally of creditors seeking to recover payments of debts, until at least one payment was overdue, the Fund had no "complete and present cause of action" (*Rawlings v. Ray*, 312 U.S. 96, 98 (1941)), "hence the statute of limitations did not begin to run" until then. *Id.*

That conclusion, however, is only a beginning in settling the statute of limitations issue raised by this case. Employers under MPPAA have an obligation to make a *series* of level payments over time according to a fixed schedule, not simply an obligation to make a single payment on the date fixed for the first payment. Since this case sought collection of many missed payments, not one, this suit was time-barred in its entirety only if the causes of action on each and every one of the required periodic withdrawal liability payments accrued more than six years before suit was filed.

That cannot be the case here. Ordinarily, an employer has no obligation under MPPAA to begin to make payments any sooner than that payment is due on the schedule set out by the plan sponsor at the outset, so that there is no actionable "act or omission" under the statute with regard to a particular periodic payment unless and until the employer fails to make *that payment* on the day it comes due. And MPPAA's statutory provision for separate causes of action, and therefore the running of separate limitations periods, with respect to each missed periodic payment is fully consistent with the legal principles that generally govern the running of statutes of limitations on obligations pay off a debt by making a series of installment payments. Applying both those traditional legal principles and the statutory language, one concludes that a § 1451 cause of action accrues upon the due date of each missed payment, and that separate limitations periods therefore begin from the date of each missed payment for the collection of the amount due on that date.

The last question in determining the statute of limitations question in this case is whether the employer was for any special reason obligated to pay the withdrawal liability as a whole, rather than on the usual, statutorily-established installment-by-installment basis, at any time outside the limitations period. While MPPAA does *allow* the plan sponsor to accelerate the entire debt once the employer misses a single payment, the acceleration provision is permissive, not automatic, and triggers no employer obligation to pay the entire amount of the debt unless the plan sponsor elects to so demand, in accord with statutory procedures and timing requirements. Again traditional legal principles recognize that such a permissive acceleration provision does not alter the general rule that the statute of limitations begins to run with each missed periodic payment unless and until the creditor exercises the option to accelerate the debt.

Here, the acceleration option was not even available until well within the limitations period, for two reasons.

First, default, a statutory prerequisite to acceleration, cannot be declared under the statute until sixty days after the first missed payment, that is, in this case, April 2, 1987 at the very earliest. And second, default also cannot be declared, under the PBGC's interpretation of the statute in its regulation, until the employer's time for challenging the assessment has run—here, March 12, 1987 at the very earliest and in fact, later than that, since the employer did in fact challenge the assessment. Ferbar therefore cannot possibly have had an obligation to pay the entire withdrawal liability debt before February 10, 1987, and the action was therefore timely on February 9, 1993 with regard to all missed payments due on or after February 10, 1987.

II. The Ninth Circuit ruled otherwise, holding that the limitations period begins to run on the date the employer withdraws from a multiemployer pension fund. This conclusion simply cannot be squared with the statutory language and structure, and would lead to all manner of absurd results.

Moreover, the reasons the Ninth Circuit gave to justify bending the statute out of shape would not be convincing even if pertinent. In particular, the Ninth Circuit's concern that, absent its limitations rule, withdrawal liability may not be assessed promptly, is not a valid one: The statute provides that the assessment must be made "as soon as practicable," § 1399(b)(1), and limits amortization interest so that it does not accrue during any delay in assessing liability. As a result, undue procrastination by the Trustees in making the assessment and notifying the withdrawing employer could give rise to an employer defense to the obligation to pay its liability and to an actionable breach of fiduciary duty by the Trustees for failure to collect withdrawal liability in a timely manner. There is, consequently, no basis for inventing a limitations period with no statutory support in order to cure a problem that the statute itself addresses quite adequately.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR ACTIONS UNDER MPPAA TO COLLECT OVERDUE EMPLOYER WITHDRAWAL LIABILITY PAYMENTS RUNS FROM THE DATE OF EACH MISSED PAYMENT.

The ultimate question in this case is whether this action to collect Ferbar's unpaid withdrawal liability is, as the Ninth Circuit held, time barred in its entirety. If it is not, then the case should not have been dismissed.

Answering that question requires, first, determining the *earliest* date on which a suit could have been filed to collect *any* part of Ferbar's unpaid withdrawal liability payments. That date is the day that Ferbar's first withdrawal payment was due and went unpaid. Under both ordinary statute of limitations principles and the plain words of MPPAA, *no* limitations period could begin to run until that date.

That, however, is only the first cut in answering the timeliness question posed here. A complete answer requires further inquiry as well, into the precise nature of the withdrawal liability payment obligation MPPAA creates and the limitations principles that govern breaches of an obligation of that kind.

Under MPPAA, the plan sponsor *must* permit the payment of an employer's withdrawal liability *by level installments over a period of up to twenty years.* Thus, under the circumstances obtaining here, the Fund could not have required Ferbar to pay any *more* than the first periodic payment determined according to statutory standards at the time that first payment was due. That being so, the Fund could not have sued to recover any more than the amount of the first payment on the day that payment was due and went unpaid.

In accord with well-established general principles concerning the accrual of a collection cause of action for unpaid

installments on a debt, the only cause of action that possibly could have accrued under those circumstances at the time of the first missed payment was a cause of action for collection of *that single payment*. The causes of action for collection of the second payment and the remaining required level payments due thereafter accrued later, less than six years before suit was filed. This suit was therefore not time-barred, and should not have been dismissed.

1. Statutes of limitations require that a plaintiff file a particular action within a specified amount of time. Limitations periods therefore have long been understood to begin to run, or "accrue", "when the right of action is complete" (*Clark v. Iowa City*, 87 U.S. 583, 589 (1875)), that is, when the plaintiff's right " 'has accrued in a shape to be effectually enforced' " (*United States v. Wurts*, 303 U.S. 414, 418 (1938), quoting *Borer v. Chapman*, 119 U.S. 587, 602 (1887)). "The time when the plaintiff could first have maintained the action to a successful conclusion" (51 Am. Jur. 2d, *Limitation of Actions* § 107 (1970)) is, in consequence, ordinarily the critical date on which the limitations period begins to run. *See also Amy v. Dubuque*, 98 U.S. 470, 474 (1879) (" 'When might this action have been instituted is the question; for from that time the statute [of limitations] must run.' "), quoting *Wilcox v. Plummer's Executors*, 29 U.S. 172, 181 (1830).

As the Court has noted, "it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations has run, but at another time for the purpose of bringing suit." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). But, as *Reiter* adds, "we will not infer such an odd result in the absence of any indication in the statute." *Id. See also United States v. Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued."); *Greyson v. Harris*, 279 U.S. 300, 304-305 (1929) (reasoning that it would be "anomalous" for a statute of limitations to begin to run "before any cause of action had accrued on which [plaintiff] could have brought suit" and consequently concluding that "[t]his, manifestly, was not intended" by Congress).

Here, it is plain from the statutory language and structure that in MPPAA Congress followed the general rule and not some "odd" variant. Actions under MPPAA are timely if filed not more than "6 years after *the date on which the cause of action arose*." 29 U.S.C. § 1451(f)(1) (emphasis supplied). The statute thus explicitly links the start of the limitations period with the accrual of the cause of action against which the limitations period will run. Accordingly, in determining when the six-year limitations period begins to run on an action to collect withdrawal liability payments under MPPAA, the pertinent question is the usual one: "When might this action have been instituted?" *Amy v. Dubuque*, 98 U.S. at 474.

2. MPPAA provides for suit by trustees "adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan." § 1451. Until there has been some "act or omission" by an employer contrary to some statutorily-imposed obligation in connection with the employer's withdrawal from a multiemployer plan, then, no legal injury to the plan has occurred, and no suit could be filed.

Considering seriatim the various junctures in the statutory scheme which might be thought to signal such an employer obligation, it becomes apparent that under MPPAA's withdrawal liability provisions, an employer's statutory duty is to make each withdrawal liability payment when due after demand by the fund trustees, and nothing more. Consequently, as is true generally of creditors seeking to recover payment of debts, until at least one payment was overdue the fund has no "complete and present cause of action," *Rawlings v. Ray*, 312 U.S. 96,

98 (1941), "hence the statute of limitations did not begin to run," *id.*, until that date.

(a) First, while MPPAA demarcates withdrawal as a statutorily-defined event from which legal obligations flow, MPPAA does not make the act of withdrawing from an underfunded multiemployer pension plan unlawful itself, or a breach of any statutory obligation. Complete and partial withdrawals occur on a regular basis as a result of normal, lawful decisions by employers, labor unions, and employees. The purpose of MPPAA was not to sanction withdrawals, but to provide a mechanism for preserving the long-term financial integrity of multiemployer plans in the face of such employer turnover.

Since MPPAA provides no employer obligation to refrain from withdrawal, there is no basis for plan trustees to sue an employer merely for withdrawing from a plan.

(b) Nor does withdrawal as such, or the date of withdrawal, have significance under the statute as a date on which withdrawing employers are supposed to *do* something which, if left undone, could give rise to a collection lawsuit.

The statutory "date of complete withdrawal" (§ 1383(e)) or of "partial withdrawal" (§ 1385) is a date set largely for purposes of fixing withdrawal liability. The statute defines the "*date* of a complete withdrawal" as "the date of the cessation of the obligation to contribute or the cessation of covered operations" § 1383(e) (emphasis supplied), and the date of "partial withdrawal" as "the last day of a plan year" in which a specified decrease in an employer's contributions or contribution obligation is completed. § 1385(a).

Assessment of the total *amount* of liability for complete withdrawal in turn, is based on "the withdrawing employer's fair share of a plan's underfunding . . . as of the last day of the plan year preceding the year during which the employer withdrew." *Schlitz*, 115 S.Ct. at 986, citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i),

(c)(3)(A), and (c)(4)(A). And the *interest component* of the periodic payments that are the basic way of satisfying an employer's withdrawal liability obligation is "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs. . . ." 29 U.S.C. § 1399(c)(1)(A)(i); *Schlitz*, 115 S. Ct. at 992. The date of withdrawal, therefore, is not even the date as of which withdrawal liability payments are calculated, but only a benchmark used in determining the relevant dates for that purpose.

Indeed, the statute defines the date of withdrawal in such a way that, in many instances, that date is necessarily determined retroactively, rather than at the time withdrawal is deemed to occur. For example, in most industries, a complete withdrawal takes place when the employer "*permanently* ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (emphasis supplied). "This determination cannot necessarily be made upon complete withdrawal; rather, it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123. *See also Trustees of Ironworkers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 210 n.4, 212-214 (7th Cir. 1989) (considering dispute over when operations permanently ceased to determine date of complete withdrawal).

Similarly, in industries covered by § 1383(a), a complete withdrawal can also occur if the employer "*permanently* ceases to have an *obligation* to contribute under the plan." § 1383(a) (emphasis supplied). Whether an employer has an *obligation* to continue to make contributions under a collective bargaining agreement is often not definitively established until months or years after the employer in fact stops making payments.[7]

[7] The employer may, for example, take the position that it has bargained in good faith to impasse and is therefore entitled to implement its last contract offer which discontinues contributions,

MPPAA also provides for special withdrawal rules for certain industries, under which it is even more likely than under the generally-applicable withdrawal rules that withdrawal will have to be determined retroactively. In the building and construction industry, for example, MPPAA provides that complete withdrawal occurs on the date an employer within that industry "ceases to have an obligation to contribute under the plan," but *only if* the employer either continues performing work within the jurisdiction of the collective bargaining agreement that required contributions to the plan *or* "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." § 1383(b)(2)(B)(ii). Since much construction work "is generally of a project-by-project nature" (126 Cong. Rec. 23,040 (August 25, 1980) (statement of Rep. Thompson)), determining whether there has been a withdrawal under this provision, and when, may require waiting as much as five years after an employer completes a project to see whether the employer returns to do work in the area.[8]

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while the union maintains that there was no good faith impasse and therefore no cessation of the contribution obligation. Whether an impasse exists may not be resolved until the conclusion of a National Labor Relations Board proceeding years later. *See Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). If the employer's position is upheld, the "date of complete withdrawal" will relate back to the date when its final contract offer was implemented and its obligation to make contributions ceased. § 1383(a) ("a complete withdrawal . . . occurs when an employer permanently ceases to have an obligation to contribute under the plan"); *see Cuyamaca Meats v. Pension Trust Fund*, 827 F.2d 491, 496-500 (9th Cir. 1987) (considering dispute over when obligation to contribute ceased to determine date of complete withdrawal).

[8] A similar provision for delayed determination of withdrawal covers certain entertainment industry employers and can, if the PBGC so determines under its regulations, cover employers in other industries as well. § 1383(c) & (f).

For certain trucking industry employers, whether a withdrawal has occurred or not is necessarily retroactively determined, since

To give one final example, under § 1398(2), a withdrawal does not occur if contributions are suspended during a labor dispute; if, when the dispute ends, however, the cessation in contributions turns out to have been permanent, the withdrawal date will then be fixed and will be based on the earlier date on which contributions in fact ceased. § 1383(e).[9]

The date of withdrawal, then, does *not* denote the date on which any employer obligation is to be performed which, if breached, could give rise to a cause of action. The withdrawal date, instead, is only a statutory reference point, and is often retroactively determined.

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the determination of withdrawal depends upon post-withdrawal actions of the PBGC. Such employers are deemed to have withdrawn after they "permanently cease[] to have an obligation to contribute under the plan or permanently cease[] all covered operations under the plan" (§ 1388(d)(3)(A)), but *only* if the PBGC "determines that the plan has suffered substantial damages to its contribution base as a result of such cessation" or the employer fails to furnish a surety bond in accordance with statutory specifications. § 1383(d)(3)(B). Even if the PBGC does not make an initial determination of "substantial damage" and the employer does post an adequate bond, the PBGC can determine up to five years later that the employer's withdrawal has resulted in "substantial damage" to the plan, with the result that the employer is then retroactively "treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased." § 1383(d)(4).

[9] *See Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852, 855 (3rd Cir. 1994) (employer's contributions to the Fund ended in 1981 during a strike; the Fund determined in 1984, when the dispute remained unresolved, that the cessation was permanent, and assessed withdrawal liability as of 1981; the employer maintained, however, that it had not withdrawn from the Fund in 1981, because the dispute was still not over as of 1984, and the cessation might still turn out to be temporary); 126 Cong. Rec. 23,038 (Aug. 25, 1980) (statement of Rep. Thompson) ("An employer is not considered to have withdrawn solely because it suspends contributions during a labor dispute . . . . [but only if] the facts and circumstances of the particullar situation indicate that contributions have ceased permanently.")

(c) Finally, where an employer withdraws from a multiemployer plan, MPPAA does not provide for any automatic, self-determinable employer obligation to pay a certain amount on some ascertainable date after withdrawal. Instead, the statute makes the assessment of liability and notification of a schedule of payments a duty of plan trustees, applying statutory standards, and imposes a duty on employers only to make payments in accordance with that notification.

The plan trustees must determine whether a withdrawal has occurred and the amount of the employer's withdrawal liability, if any.[10] § 1382. Then, "as soon as practicable," the trustees must "(A) notify the employer of—(i) the amount of the liability, and (ii) the schedule for liability payments, and (B) demand payment in accordance with the schedule." § 1399(b)(1).

The statute "makes clear," as this Court recognized in *Schlitz*, "that the withdrawing employer owes nothing until its plan demands payment." 115 S.Ct. at 988. "In fact, the withdrawing employer cannot determine, or pay, the amount of its debt, until the plan has calculated that amount." 115 S.Ct. at 988.[11]

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[10] It is entirely possible that the withdrawing employer will owe nothing altogether, even if the plan has unfunded vested liability. *See* § 1391(b)(1) (providing that in some situations "the unfunded vested benefits allocable to the employer shall be zero."); § 1389 (establishing a "de minimus" rule under which an employer who would owe a relatively small amount of withdrawal liability may be excused from paying anything); *see* Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S.1070, The Multiemployer Penion Plan Amendments Act of 1980: Summary and Analysis of Consideration 17 (Committee Print 1980) (explaining "de minimus" rule).

[11] Calculation of withdrawal liability depends upon information about the actuarial and financial status of the fund in the aggregate and of the employer's proportional share of the fund's liability, information that the fund has but the employer usually does not. *See* § 1401(e) (providing that the employer may request such information from the fund, some of which is to be provided without cost and some of which the fund can charge for providing.)

It is when the withdrawing employer has been served by plan trustees with a schedule for payment of withdrawal liability that MPPAA first imposes a legally cognizable obligation on the employer. To be sure, at that point, the employer is entitled to request that the trustees review the determination of liability and/or the payment schedule, § 1399(b)(2), and, if dissatisfied, may initiate arbitration. § 1401(a). But the statute provides in express terms that "[w]ithdrawal liability *shall be payable in accordance with the schedule* set forth by the plan sponsor . . . *notwithstanding* any request for review or appeal of determinations of the amount of such liability or of the schedule" § 1399(c)(2) (emphasis supplied). *See also* § 1401(d) (when arbitration has been timely initiated, "[p]ayments shall be made by the employer in accordance with the determinations made under this part until the arbitrator issues a final decision . . . ."; § 1401(b)(1) ("[i]f no arbitration proceeding has been initiated, . . . the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor"); § 1451(b) ("any failure of the employer to make any withdrawal liability payment with the time prescribed shall be treated in the same manner as a delinquent contribution").

Thus, MPPAA does not require the withdrawing employer to pay withdrawal liability until the fund demands payments, or to make any withdrawal liability payment before it is due on the fund-provided schedule. What MPPAA *does* require of an employer is to make the schedule of payments so demanded, on time. An employer who does not do so *does*, indeed, breach a statutory duty.

(d) When that breach occurs, *a* "cause of action" for collection of withdrawal liability *does* "arise" under MPPAA. § 1451(f).

MPPAA directs the plan trustees, in addition to notifying the employer of its withdrawal liability and demanding payment, to "collect the amount of the withdrawal liability from the employer." § 1382(3). As a means toward that end, the statute provides for concurrent federal and state court jurisdiction over "an action brought by a plan fiduciary to collect withdrawal liability." § 1451(c). And, the statute provides that "[i]n any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution" (§ 1451(b)), thereby entitling the trustees to recover the overdue payments, plus interest and liquidated damages, plus their attorney's fees. *See* § 1451(b), § 1145, § 1132(g).

It is on the date that the employer fails to make payment when due that the trustees may initiate such a collection suit—and not any earlier. Accordingly, for an action to collect withdrawal liability, the date of the first missed payment is the earliest date on which the statute of limitations could have begun to run for any of the liability payments. § 1451(f).

This analysis is confirmed by the general run of cases concerning the accrual of causes of action for collection of debts. For example, this Court addressed an essentially similar statute of limitations issue in *Rawlings v. Ray*, *supra*, holding that the statute of limitations began to run for an action to collect a debt when payment was overdue. As the Court recognized, although the debt existed earlier, until payment was overdue the creditor had no "complete and present cause of action" (312 U.S. at 98; citations and internal quotation marks omitted) to recover it, so the limitations period did not begin to run:

> While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. ***Respondent was allowed until that date to pay and prior thereto suit could not be brought against him. Hence the statute of limitations did not begin to run*** until December 13, 1935 . . . . [*Id.* (emphasis supplied.)]

See also, e.g., Moline Plow Co. v. Webb, 141 U.S. 616 (1891) (limitations period on promissory notes begins to run on their maturity dates); *Clark v. Iowa City*, 87 U.S. at 589 (limitations period on bond coupons begins to run from their respective maturity dates because that is when "a complete right of action upon such claims exists in the holder"); *Amy v. Dubuque*, 98 U.S. at 474 (1879) (same).

3. The conclusion that a multiemployer plan has *a* collection cause of action available when the withdrawing employer fails to make a single payment is only the first step in settling the limitations issue presented here. For employers under MPPAA have an obligation to make a series of level payments over time, according to a fixed schedule, not simply the obligation to make a single payment on the date fixed for the first payment. Since this case sought collection of many missed payments, not one, this suit was time-barred in its entirety only if the causes of action for payment of each and every one of those required withdrawal liability payments accrued more than six years before suit was filed.

In determining whether that was the case, the pertinent and determinative issues become (i) when do the statutory causes of action accrue, and limitations periods begin to run, for periodic payments due after the first payment; and (ii) when, if ever, does a statutory cause of action accrue, and a limitations period begin to run, on the total withdrawal liability debt. Again, these questions are best answered by ascertaining first, the precise nature of the payment duty imposed upon employers by the statute, and second, how the statute provides for the enforcement of that duty by the fund.

(a) Numerous provisions of MPPAA make clear that the basic obligation imposed by the statute is an obligation to make periodic contributions to the fund as the employer did before withdrawal, not a duty to pay the liability debt as a whole at the outset.

An employer's withdrawal liability under MPPAA is comprised of a series of statutorily-determined "level annual payments," § 1399(c)(1)(A)(i), which are further broken down into a schedule of "4 equal installments due quarterly, or at other intervals specified by plan rules." § 1399(c)(3); *see* § 1399(c)(1)(C) & (E) (specifying the amount of each annual payment). The plan sponsor *must* initially "demand payment in accordance with the schedule," § 1399(b)(1)(B), in amounts consistent with statutory directives, §§ 1399(c)(1)(A) & (C), and *cannot* require an up-front payment in full. The statute adds that "[w]ithdrawal liability shall be payable in accordance with the schedule," § 1399(c)(2), and that, if the employer fails to initiate arbitration, "the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor," § 1401(b).

The manner in which the amount of the withdrawal liability payments is calculated—to roughly approximate the employer's contributions to the plan prior to withdrawal—underlines the point that Congress understood the employer's withdrawal liability obligation as one that mimics the obligation to make periodic contributions that existed before withdrawal. MPPAA, indeed, "provide[d] for continued funding by the withdrawn employer in line with its previous contributions so as to make the liability an annual business cost." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 83 (1980); *see also id.* at 83 (the statute "requires that a withdrawing employer *continue* funding a proportional share of the Plan's unfunded benefit obligations" (emphasis supplied)).

The conclusion that Congress saw the withdrawal liability obligation as essentially one to continue to make timely contributions to the fund, as the employer had before withdrawal, for the period of time necessary to pay off its unfunded vested liability, is reinforced by the statute's explicit directive, twice repeated, that the failure to make a withdrawal liability payment is to be treated as if the employer had failed to make a timely contribution while still participating in the plan. § 1401(d); § 1451(b).

The statute, to be sure, *allows* an employer the *option* to "*prepay* the outstanding amount of the unpaid annual withdrawal liability payments . . . without penalty." § 1399(c)(4), (emphasis supplied). But the employer's basic *obligation* under MPPAA—the statutory duty which the plan sponsor can enforce through a lawsuit—is to pay the installments as they come due.

(b) Because MPPAA requires that an employer make a series of installment payments according to a pre-set schedule, as a matter of pure logic an employer who complies with the obligation to make one payment does not thereby fulfill the obligation to make any and all payments not yet due. Conversely, an employer who fails to make one or several payments does not thereby breach its payment obligation with regard to scheduled payments not yet due at the time of the missed payment or payments, and therefore could not be sued at the time of those missed payments for breach of the obligation to make such later-due payments.

Rather, the employer under MPPAA has an independent statutory obligation with respect to the making of each payment as it becomes due, and a multiemployer plan has a collection cause of action for the employer's failure to make any particular payment. Each such cause of action can arise only at the time the employer does not make a particular payment on the day it comes due, not any earlier. Both MPPAA and the general, back-

ground law covering collection of installment payment obligations so recognize.

(i) MPPAA provides for the accrual of an action to collect *each* periodic payment as it becomes due. First, the MPPAA civil action provision provides as a general matter for suit whenever there has been an "act or omission of any party under this subtitle." § 1451(a). Since the employer's obligation under the statute is to make a series of installment payments as they become due, each failure to do so is an actionable "omission . . . under this subtitle." By the same token, until a particular payment has come due, there has been no "omission . . . under this subtitle" on which a multiemployer plan can file suit for that payment.

More specifically, the statute provides with regard to collection of withdrawal liability in particular:

> In any action under this section [§ 1451] to compel an employer to pay withdrawal liability, any failure of the employer to make *any withdrawal liability payment* within the time prescribed shall be treated in the same manner *as a delinquent contribution.* [§ 1451(b) (emphasis supplied).]

MPPAA therefore contemplates a suit based on a failure to make *any* particular payment at its scheduled time, a cause of action that can only accrue once that payment comes due, and not before.

(ii) The statutory provision for separate obligations, and therefore accrual of separate potential causes of action, each time an employer fails to make an installment payment is consistent with the legal rules generally applicable in the commercial world. *See Schlitz*, 115 S.Ct. at 988 (the similarity between the withdrawal liability obligation imposed by MPPAA and common commercial installment payment schemes is an aid in the interpretation of MPPAA).

Ordinarily, obligations to pay money in installments are breached one installment at a time. That is, the failure of the debtor to make one payment when due is not a failure to make the later scheduled payments not yet due, and does not entitle the creditor to insist upon the remainder. Restatement (Second) of Contracts § 243(3) & cmt. c.; *see also, e.g., New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 680 (1936); *Mobley v. New York Life Ins. Co.*, 295 U.S. 632, 638-39 (1935).

Not surprisingly, the well-settled rule for applying statutes of limitations to installment payments flows from the principle that a separate cause of action accrues with each failure to pay, and provides for separate limitations periods beginning with each failure to make a periodic payment.[12] *See* Annotation, When Statute of Limitations Begins to Run Against Action to Recover Upon Contract Payable in Installments, 82 A.L.R. 316 (1933) ("[I]t has come to be the established rule that when recovery is sought on a note or other obligation payable by installments, the Statute of Limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it."); 51 Am. Jur. 2d, *Limitations of Actions* § 133 (1970); J.K. Angell, *Limitations of Actions at Law* §§ 110-11, at 102-03 (4th ed. 1861); 54 C.J.S. *Limitation of Actions* § 153 (1987); 4 A. Corbin, *Contracts*

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[12] The manner in which statutes of limitations are applied to installment payments stems from the more general rule that, where the plaintiff is injured by a succession of separate acts by the defendant, each of which constitutes a legal violation, the limitations period generally begins anew from the date of each wrongful act, "although commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr v. A.O. Smith Corp.*, 65 U.S.L.W. 4514, 4517 (1997).

§ 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* § 2026C (3d ed. 1978).[13]

Applying these traditional principles as well as the statutory language, the § 1451 cause of action accrues upon the due date of each missed installment payment, and separate limitations periods therefore begin from the date of each missed payment for the collection of the amount due on that date. § 1451(f).

(c) The last question in determining the statute of limitations issue in this case is whether the employer was for any special reason obligated to pay the withdrawal liability as a whole, rather than on the usual, statutorily-established installment-by-installment basis, at any time outside the limitations period. Applying the general rules governing the running of statutes of limitations discussed above, only if there were some such special obligation could the statute of limitations for the total withdrawal liability amount have run before this suit was filed.

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[13] *Accord United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993); *United States v. LaFrance*, 728 F. Supp. 1116, 1119-20 (D. Del. 1990); *Navy Federal Credit Union v. Jones*, 930 P.2d 1007, 1110 (Ariz. App. 1996); *Fenske v. Board of Administration*, 163 Cal. Rptr. 182 (Cal. App. 1980); *Worrel v. Farmers Bank*, 430 A.2d 469, 473-75 (Del. 1980); *Central Home Trust Co. v. Lippincott*, 392 So.2d 931, 933 (Fla. Dist. Ct. App. 1980); *Haughton v. Haughton*, 394 N.E.2d 385, 388 (Ill. 1979); *Ellsworth v. West*, 668 So.2d 402, 405 (La. App. 1996); *Sparta State Bank v. Covell*, 495 N.W.2d 817, 819 (Mich. App. 1992); *Honn v. National Computer Systems*, 311 N.W.2d 1, 2 (Minn. 1981); *Freeman v. Truitt*, 119 So.2d 765 (Miss. 1960); *Vrede v. Koch*, 380 S.E.2d 615, 617 (N.C. App. 1989); *Richter v. Richter*, 126 N.W.2d 634, 638 (N.D. 1964); *Bauers v. City of Lincoln*, 514 N.W.2d 625, 632 (Neb. 1994); *General Theraphysical v. Dupuis*, 385 A.2d 227, 228 (N.H. 1978); *Metromedia v. Hartz Mountain Assoc.*, 655 A.2d 1379, 1380 (N.J. 1995); *Clayton v. Gardner*, 813 P.2d 992, 998-99 (Nev. 1991); *Pagano v. Smith*, 608 N.Y.S.2d 268, 270 (N.Y. App. Div. 1994); *Lancaster Colony Corp. v. Lindley*, 400 N.E.2d 905, 906 (Ohio 1980); *Oklahoma Brick Corp. v. McCall*, 497 P.2d 217 (Okla. 1972); *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982); *Goldfield v. Kassoff*, 470 S.W.2d 216, 217 (Tex. Civ. App. 1971).

(i) MPPAA does contain an acceleration clause, § 1399(c)(5), providing:

> In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. [§ 1399(C)(5) (emphasis supplied).]

"Default" is defined, *inter alia*, as "the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notice from the plan sponsor of such failure." If the plan sponsor properly invokes § 1399(c)(5), one would expect that the employer would incur a statutory obligation to pay the entire liability amount no earlier than 60 days after notification,[14] and a cause of action for that amount would accrue if that obligation, once it matured, were not met.

But for present purposes, the salient point is that the language of the acceleration provision itself confirms that an employer has *no* obligation to pay the entire withdrawal amount simply because one or more payments is missed. Instead, because that provision is in terms permissive, providing that the plan sponsor "may" accelerate the debt, and because that permissive provision is triggered by particular acts by the plan sponsor—providing written notice of delinquency and demanding payment in full—the employer has no obligation to pay the entire withdrawal liability unless the plan sponsor takes up the permission, provides the required notice and makes the

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[14] It is not clear under the statute whether the obligation to pay the entire liability would arise of its own accord 60 days after notice of delinquency, or whether the plan sponsor would have to provide a separate notice invoking the right of acceleration after the 60-day period has run. This ambiguity is not here relevant since, as we develop later, acceleration was not available under the statute at any pertinent time.

necessary demand. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 28 (1980) ("in the event of a default by an employer in payment of its withdrawal liability, the plan sponsor is to be *permitted* to require immediate payment of the balance of the employer's withdrawal liability" (emphasis supplied)); *id.*, pt. 1, at 84; Joint Committee on Taxation, 96th Cong., 2d Sess., Description of Legislation Relating to Pension Benefit Guaranty Corporation Termination Insurance for Multiemployer Pension Plans 22 (Joint Committee Print March 14, 1980); Senate Labor and Human Resources Committee and Finance Committee, Joint Explanation of S. 1076; Multiemployer Pension Plan Amendments Act of 1980, 126 Cong. Rec. 20,197 (July 29, 1980) (if a default occurs "other than a default occurring while the employer is challenging a plan's determination of withdrawal liability . . . the plan sponsor is to be *permitted* to require [acceleration]" (emphasis supplied)).

As the permissive language also indicates, Congress necessarily contemplated that the sponsor may choose *not* to call in the entire debt simply because one payment was missed.[15] There are many situations in which a responsible commercial creditor will choose *not* to accelerate a debt. For example, a creditor may know that to require immediate payment of the entire amount of the debt would make

[15] A PBGC regulation provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of all or a portion of the outstanding amount of an employers' withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability." 29 C.F.R. § 4219.31(b)(2) (emphasis supplied). By recognizing that acceleration can be partial or whole, this regulation emphasizes that the acceleration provision is one designed to provide plan sponsors with flexibility, not to mandate any obligation on the part of employers to pay, or on plan sponsors to require payment of, the whole liability amount.

the debtor insolvent, precipitating a bankruptcy proceeding in which some or all of the debt could be forgiven, while abiding some missed payments could allow the debtor time to make a financial recovery, make up the missed payments, and resume payment according to schedule. Congress specifically meant for plan trustees to have the same flexibility as other creditors:

> It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. [126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson).]

See also Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S.1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 21 (Comm. Print 1980) ("The Committee includes this acceleration rule to reduce the plan's risk of loss with respect to withdrawing employers and to discourage unwarranted delays in payment by withdrawing employers.")

MPPAA's permissive acceleration provision, therefore, does not give rise to any cause of action for the withdrawal liability as a whole unless and until it is properly invoked at the plan sponsor's discretion, and therefore does not affect the running of the statute of limitations unless it is applicable and exercised.

(ii) The conclusion that Congress so intended is reinforced, once again, by the consideration that one would come to precisely the same conclusion applying established principles of commercial law.

Acceleration clauses are ordinarily included in commercial installment payment contracts to protect creditors, because of dissatisfaction with the principle that causes of action accrue only with each missed payment, potentially

necessitating multiple collection suits to avoid the running of statutes of limitation on some of the missed payments while others are still not due. Restatement (Second) of Contracts § 243 cmt. d; 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 8.18, at 254-55 (1990). The general understanding, therefore, has long been that "[w]here the acceleration provision is optional with the creditor, the general theory of the courts is that the provision is for the creditor's benefit; he may or may not take advantage of it." Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of the Statute of Limitations, 34 ALR 897, 900 (1925).

Thus, "where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute [of limitations] begins to run, only with respect to each installment, at the time the installment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option." 51 Am.Jur.2d *Limitation of Actions* § 133 (1970).[16] *See also General Theraphysical v. Dupuis*, 385 A.2d 227, 228 (N.H. 1978) ("[i]t appears to be the universal rule that when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due even though the creditor has the option to declare the whole sum due on default of an installment, unless he exercises that option"); Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of the Statute of Limitations, 34 ALR 897, 900 (1925); Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of

[16] The exercise of an acceleration clause does not, however, affect the running of the statute of limitations as to payments already past due at the time of acceleration, "since the acceleration clause only accelerates the due date of future installments to the date of the exercise of the right of accleration." 54 C.J.S. *Limitation of Actions* § 153 (1987).

the Statute of Limitations, 161 ALR 1211 (1946); 54 C.J.S. *Limitation of Actions* § 153 (1987); 4 A. Corbin, *Contracts* § 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* § 2027 (3d ed. 1978).[17]

The option of acceleration of the withdrawal liability debt under MPPAA, then, does not affect the date on which a cause of action for the payment of any withdrawal liability installment payment accrues unless that option has been exercised.

(iii) Not only is acceleration an *option* to be exercised by the fund if it chooses, but it is an option available under MPPAA and the applicable PBGC regulations *only* if certain prerequisites are met. In this case, two different statutory prerequisites to the exercise of the acceleration option had not yet occurred at the time of the first missed payment, so that the employer could not possibly have had an actionable duty to pay the entire debt at any time outside the limitations period.

Specifically, the Trustees filed their complaint against Ferbar on February 9, 1993. J.A. 1. This was less than six years after the employer had any obligation to pay any of the installment payments except the first on the schedule established by the Fund. J.A. 20, 24. As we have seen, under MPPAA § 1399(c)(5), the plan

[17] *Accord United States v. Dos Cabezas Corp.*, 995 F.2d at 1490; *United States v. Fertal*, 849 F.2d 354, 356 (8th Cir. 1988); *United States v. LaFrance*, 728 F. Supp. at 1119-20; *Navy Federal Credit Union v. Jones*, 930 P.2d at 1110; *Worrel v. Farmers Bank*, 430 A.2d at 473-75; *Central Home Trust Co. v. Lippincott*, 392 So.2d at 933; *Wall v. Citizens & Southern Bank*, 274 S.E.2d 486, 487 (Ga. 1981); *Frenzel v. Frenzel*, 152 N.W.2d 157, 159-60 (Iowa 1967); *Thomas v. Goff*, 596 P.2d 794, 797 (Idaho 1979); *Ellsworth v. West*, 668 So.2d at 405; *Honn v. National Computer Systems*, 311 N.W.2d at 2; *Becker v. Lammers*, 229 N.W.2d 557 (Neb. 1975); *Clayton v. Gardner*, 813 P.2d at 998-99; *American State Bank & Trust Co. v. Sorenson*, 539 N.W.2d 59 (N.D. 1995); *Pagano v. Smith*, 608 N.Y.S.2d at 270; *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d at 923.

sponsor's option to accelerate is triggered by a "default," defined as "the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." § 1399(c)(5)(A). And, under PBGC regulations, the plan sponsor cannot declare a default because of missed payments until at least 60 days after the later of (i) expiration of the period for requesting review by the plan; (ii) expiration of the period for initiating arbitration; or (ii) if arbitration is timely initiated, issuance of the arbitrator's decision. 29 C.F.R. § 4219.31(c)(1).

Here, since under the payment schedule set out by the Trustees the first payment was not on any view due before February 1, 1987 (*see* p. 35, *infra*), "default" could not have been declared under § 1399(c)(5) until April 2, 1987 at the absolute earliest.[18] And since the period for initiating review by the plan did not run under § 1399(b)(2) until 90 days after the initial, December 12, 1986, demand letter—that is, March 12, 1987—the Fund could not under 29 C.F.R. § 4219.31(e)(1) have declared a default until that date at the very earliest, and then only if Ferbar had failed to initiate review or arbitration.[19]

In this case, then, the employer could not possibly have had any obligation arising before February 10, 1987 to pay the entire withdrawal liability debt. Since that is the case, the above analysis concerning the running of separate limitations periods with regard to each missed payment absent valid acceleration indicates that the action

[18] It is far from clear that a default could have been declared on precisely the sixtieth day after the first missed payment. "Default" runs not from the date of the missed payment but from the date of a notice of delinquency, and that notice is unlikely to be—and probably could not properly be—filed on the very day the payment was due.

[19] In fact, Ferbar did timely initiate review and then arbitration (J.A. 31, 37), so that default could not have been declared on March 12.

was in fact timely on February 9, 1993, as to all missed installment payments due on or after February 10, 1987.

(iv) That leaves only the question whether the suit was timely as to the first missed payment. The Fund's notification to Ferbar made that payment due on February 1, 1987, so on first glance it would appear that this lawsuit was time-barred as to that single, $345.50 payment.

But the assessment notice was sent on December 12, 1996, and MPPAA provides for an automatic 60-day grace period to begin making payment after receiving a demand. *See* § 1399(c)(2) ("[w]ithdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning not later than 60 days after the date of the demand") *see* J.A. 44 (applicable Plan rule provides that "[p]ayment of withdrawal liability shall commence no later than 60 days after demand is made therefor by the Trustees"); *Ludington News Co. and Michigan UFCW/Drug Employers Pension Fund*, 9 Employee Benefits Cas. (BNA) 1913, 1916 n. 1 (Arb, 1988) (§ 1399(c)(2) "allow[s] the withdrawing employer 60 days after demand within which to make payment"); *Carnation Co. and Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409, 1448 (Arb. 1988) (same). Since the 60-day grace period did not expire until February 10, 1987, the employer had no statutory duty to make any payment until then, and no cause of action for failure to pay arose until then. Since the lawsuit was filed February 9, 1993, it would appear that the suit was timely as to the first missed payment as well.

* * * *

The upshot, therefore, is that *at worst* this suit is time-barred as to a single periodic payment and timely as to all the rest of Ferbar's unpaid withdrawal liability obligation, and that the suit may well be, under § 1399(c)(2), timely as to the first missed payment as well.

II. THE NINTH CIRCUIT'S HOLDING THAT THE LIMITATIONS PERIOD BEGINS TO RUN UPON THE DATE OF COMPLETE WITHDRAWAL FINDS NO SUPPORT IN THE STATUTE.

In ruling to the contrary, the Ninth Circuit held that the § 1451(f)(1) limitations period begins to run on the date the employer withdraws from a multiemployer pension fund. This conclusion simply cannot be squared with the statutory language and structure, and would lead to all manner of absurd results. Moreover, the reasons the Ninth Circuit gave to justify bending the statutory scheme out of shape would not be convincing even if the courts were permitted to disregard the statutory scheme as Congress devised it.

1. The limitations period could begin to run on the date of complete withdrawal only if "the right of action [were] complete" on that date, *Clark v. Iowa City*, 87 U.S. at 589, and this lawsuit could have been filed then. But the withdrawal itself violated no statutory duty, and established no employer obligation to do anything on the date of withdrawal, including pay withdrawal liability. *See* pp. 16-19, *supra*. Rather, the employer incurred a statutory obligation to make withdrawal payments only after the Fund's assessment of that liability, and then only on a installment-by-installment schedule established in the letter of demand. *See* pp. 20-25, *supra*.

On the Ninth Circuit's contrary view of the statute, the requirement that "*after* an employer's complete or partial withdrawal" the plan trustees must determine the amount of withdrawal liability and a payment schedule, notify the employer of the liability and the schedule, and demand payment in accordance with the schedule" (§ 1399(b); emphasis supplied), would serve no purpose, as the trustees could simply initiate a lawsuit before doing any of that. Nor would it make sense for the statute to require that the employer be permitted to make payments in accordance with a schedule (*see* § 1399(b)(2), § 1401(b)(1), § 1401(d)), if the trustees could bring suit to collect the entire withdrawal liability amount whenever they chose to do so after withdrawal. And, since MPPAA contemplates that the payment schedule may stretch as long as 20 years, § 1399(c)(1), a limitations period triggered by the employer's complete withdrawal would expire long before many of these installments come due, making those installments, apparently, entirely uncollectible. Congress certainly did not so intend.[20] *See, e.g.*, § 1451(b)(2) (referring to an action based on "any failure of an employer to make any withdrawal liability payment within the time prescribed" not just missed payments within six years of complete withdrawal.)

The foregoing is more than sufficient to show that the MPPAA statutory scheme cannot support the theory that there is a cause of action of any kind to collect withdrawal liability on the date deemed to be the date of complete withdrawal. And absent accrual of such an automatic cause of action, the limitations period could not run from the date of withdrawal.

2. The reasons the Ninth Circuit gave for nonetheless preferring a limitations period beginning with the date of withdrawal would not be persuasive even if they were—as they are not—relevant, given the statutory scheme.

The Ninth Circuit considered its limitations rule "to involve a more natural construction of § 1451(f), which

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[20] The Ninth Circuit apparently recognized that its limitations rule could produce this last absurd result, opining that an employer who begins making installment payments in accordance with the schedule might be deemed to have agreed implicitly to a "contract to pay off the withdrawal liability," and that a plan then "might have a separate claim, with its own statute of limitations, for breach of that contract." Pet. App. 5a n.4. But MPPAA makes clear that an employer has a *statutory* obligation to pay the withdrawal liability, and to make payment in accordance with the schedule set according to statutory requirements, "notwithstanding" the employer's *disagreement* with the plan sponsor's payment demand. 29 U.S.C. § 1399(c)(2), § 1401(d).

sets the limitation as '6 years after the date on which the cause of action arose, or three years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such a cause of action,' " because "[t]here is little reason for the second clause if the cause of action does not come into existence until demand for payment is made and refused." *Thibodo*, 34 F.2d at 918. But the § 1451(f) limitations period applies to *all* actions under § 1451, not just to actions to collect withdrawal liability. For example, MPPAA in addition to regulating the collection of withdrawal liability also regulates mergers and transfers between multiemployer plans (§ 1411), transfers between multiemployer plans and single-employer plans (§ 1412), transfers among plans pursuant to a change in collective bargaining representative (§ 1415), reorganizations (§§ 1421-22), minimum contribution requirements (§§ 1423-24), adjustments in accrued benefits (§ 1425) and plan insolvency (§ 1426). Actions in any of those contexts might implicate the 3-year "discovery rule" of § 1451(f)(2). Applying § 1451(f)(1) in accordance with its terms therefore does not result in a less "natural" construction of the limitations provision as a whole.[21]

[21] The Ninth Circuit also seemed influenced by its perception that the six-year statute of limitations in § 1451(f)(1) is unusually long. In fact, limitations periods of six years are provided by other federal statutes. *See, e.g.*, 28 U.S.C. § 2401 (six-year limitations period for actions against United States, except as otherwise provided); § 2415 (six-year limitations period for actions by United States, except as otherwise provided). Limitations periods of six years or more are also used by many states for actions for breach of written contracts. *See, e.g.*, Ala. Code § 6-2-33 (1996) (ten-year limitation on actions "founded upon any contract"); Ga. Code Ann. § 9-3-24 (1977) (six-year limitation on actions upon contracts); Ind. Code Ann. § 34-1-2-2 (Burns 1996) (ten year limitation on actions upon contracts); Ky. Rev. Stat. Ann. § 413.090 (1996) (fifteen year limitation on contract actions); Mass. Ann. Laws ch. 260 § 2 (1996) (six-year limitation on contract actions); N.Y. Civ. Prac. L. & R. § 213 (1997) (contract actions to "be commenced within six years"); N.D. Cent. Code § 28-01-16 (1995) (six-year limitations period for actions upon a contract); Or. Rev. Stat. § 12.080 (1996) (six-year limitations period for actions on contracts); Wash. Rev. Code § 4.16.040 (1996) (six-year limitations period for actions on contracts).

The Ninth Circuit also considered its rule as necessary to ensure that pension plan sponsors promptly assess and collect withdrawal liability. *Thibodo*, 34 F.3d at 917-18. But the MPPAA, in addition to directing plan trustees to act "as soon as practicable" (§ 1399(b)(1)), already provides ample incentives for trustees to act with dispatch.

First, delay in assessing and demanding payment of withdrawal liability prejudices the plan through the loss of interest. Calculation of an employer's total withdrawal liability is based on "the withdrawing employer's fair share of a plan's underfunding . . . . as of the last day of the plan year preceding the year during which the employer withdrew." *Schlitz*, 115 S.Ct. at 986 (emphasis omitted), citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A). The "level annual payments" necessary to amortize an employer's withdrawal liability are then "calculated *as if* the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and *as if* each subsequent payment were made on the first day of each subsequent plan year." § 1399(c)(1)(A)(i) (emphases supplied). Because this statutory formula does not take into account the period between the withdrawal date and the plan sponsor's subsequent demand for payment, the plan loses interest for that period. *Schlitz*, 115 S. Ct. at 990 ("[I]n making the first installment 'payable' only after the plan demands it, MPPAA contemplates that an employer sometimes must pay its actual first installment long after the withdrawal year . . . in which case no interpretation of the statute can avoid an employer's actually paying something less than its fair share of interest.") By contrast, once the plan sponsor demands payment in accordance with the schedule, "[i]f a payment

is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made." § 1399(c)(3).

Second, an employer prejudiced by a plan sponsor's failure to demand payment of withdrawal liability "as soon as practicable" (§ 1399(b)(1)) can raise that failure as a defense in arbitration to the assessment of withdrawal liability. *Giroux Bros. Transportation, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d 1, 2, 4 (1st Cir. 1996); *Joyce v. Clyde Sandoz Masonary*, 871 F.2d at 1126-27. *See, e.g., Korman Corp. and Teamsters Pension Fund of Philadelphia*, 10 Employee Benefits Cas. (BNA) 1608 (Arb. 1988) (considering the defense but rejecting it because of the employer's failure to demonstrate prejudice). Thus, a plan that is dilatory in assessing withdrawal liability and demanding payment risks losing the ability to collect the amount due.

Third, because delay in taking action to demand payment of withdrawal liability results in the loss of interest and potential inability to collect the withdrawal liability at all, plan trustees who fail to perform their statutory duty may invite claims for breach of fiduciary duty. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571-83 (1985) (observing that "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled" and "create[s] a trustee responsibility for assuring full and prompt collection of contributions owed to the plan."); § 1382 (providing that "the plan sponsor . . . shall . . . (1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer.") Plan beneficiaries could sue procrastinating trustees under ERISA, seeking to recover for the fund the earnings the withdrawal funds could have generated for the beneficiaries had those funds been timely assessed, collected and invested.

Thus, the Ninth Circuit's practical concerns are fully met by statutory provisions quite separate from the limitations section, and those concerns provide no justification for applying that limitations section as the court below erroneously did.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), provides in relevant part as follows:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

. . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

. . . .

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an abligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this pargaraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B) (ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primar-

ily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall

be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in

the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sums of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits foreach plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C) * * *. Actual payment shall commence in accordance with subparagraph (2).

(ii) The determination of the amortization period, described in clause (i) shall be based on the assmuptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

. . . .

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. . . .

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399 (b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b) (1) of this title.

. . . .

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

. . . .

(d) Payments by employer prior to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

. . . .

(b) Failure of employer to make timely withdrawal liability payment within prescribed time.

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the prescribed time shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

. . . .

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

The regulations of the Pension Benefit Guaranty Corporation (PBGC) provide in relevant part as follows:

§ 4219.31 Overdue and defaulted withdrawal liability; overpayment.

(a) Overdue withdrawal liability payment. Except as otherwise provided in rules adopted by the plan in accordance with § 4219.33, a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor.

(b) Default.

(1) Except as provided in paragraph (c)(1), "default" means—

(i) The failure of an employer to pay any overdue withdrawal liability payment within 60 days after the employer receives written notification from the plan sponsor that the payment is overdue; and

(ii) Any other event described in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liabiilty.

(2) In the event of a default, a plan sponsor may require immediate payment of all or a portion of the outstanding amount of an employer's withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability.

(c) Plan review or arbitration of liability determination. The following rules shall apply with respect to the obligation to make withdrawal liability payments

during the period for plan review and arbitration and with respect to the failure to make such payments:

(1) A default as a result of failure to make any payments shall not occur until the 61st day after the last of—

(i) Expiration of the period described in section 4219(b)(2)(A) of ERISA;

(ii) If the employer requests review under section 4219(b)(2)(A) of ERISA of the plan's withdrawal liability determination or the schedule of payments established by the plan, expiration of the period described in section 4221(a)(1) of ERISA for initiation of arbitration; or

(iii) If arbitration is timely initiated either by the plan, the employer or both, issuance of the arbitrator's decision.

(2) Any amounts due before the expiration of the period described in paragraph (c)(1) shall be paid in accordance with the schedule established by the plan sponsor. If a payment is not made when due under the schedule, the payment is overdue and interest shall accrue in accordance with the rules and at the same rate set forth in § 4219.32.

(d) Overpayment. If the plan sponsor or an arbitrator determines that payments made in accordance with the schedule of payments established by the plan sponsor have resulted in an overpayment of withdrawal liability, the plan sponsor shall refund the overpayment, with interest, in a lump sum. The plan sponsor shall credit interest on the overpayment from the date of the overpayment to the date on which the overpayment is refunded to the employer at the same rate as the rate for overdue withdrawal liability pay-

ments, as established under § 4219.32 or by the plan pursuant to § 4219.33.

. . . .

29 C.F.R. § 4219.32 Interest on overdue, defaulted and overpaid withdrawal liability.

(a) Interest assessed. The plan sponsor of a multiemployer plan—

(1) Shall assess interest on overdue withdrawal liability payments from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e); and

(2) In the event of a default, may assess interest on any accelerated portion of the outstanding withdrawal liability from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e).

. . . .

(d) Due date. Except as otherwise provided in rules adopted by the plan, the due date from which interest accrues shall be, for an overdue withdrawal liability payment and for an amount of withdrawal liability in default, the date of the missed payment that gave rise to the delinquency or the default.

(e) Date paid. Any amount of withdrawal liability shall be deemed to have been paid on the date on which it is received.

29 C.F.R. § 4219.33 Plan rules concerning overdue and defaulted withdrawal liability.

Plans may adopt rules relating to overdue and defaulted withdrawal liability, provided that those rules are consistent with ERISA. These rules may include, but are not limited to, rules for determining the rate of interest to be charged on overdue, defaulted and overpaid withdrawal liability (provided that the rate

reflects prevailing market rates for comparable obligations); rules providing reasonable grace periods during which late payments may be made without interest; additional definitions of default which indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability; and rules pertaining to acceleration of the outstanding balance on default. Plan rules adopted under this section shall be reasonable. Plan rules shall operate and be applied uniformly with respect to each employer, except that the rules may take into account the creditworthiness of an employer. Rules which take into account the creditworthiness of an employer shall state with particularity the categories of creditworthiness the plan will use, the specific differences in treatment accorded employers in different categories, and the standards and procedures for assigning an employer to a category.